15-146

IN THE

Supreme Court of the United States

QUARTAVIOUS DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FOR THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

This brief is filed in support of Petitioner, Quartavious Davis, by the Florida Association of Criminal Defense Lawyers ("FACDL"), a statewide organization with more than 1,700 members across Florida, including private attorneys, assistant public defenders, and judges. Affiliated with the National Association of Criminal Defense Lawyers ("NACDL"), FACDL's mission is, *inter alia*, to "be the unified voice of an inclusive criminal defense community" and to "promote the proper administration of criminal justice." Florida's criminal defense community is concerned about the inconsistencies that now exist due not only to intercircuit conflict, but also state-federal conflict.

SUMMARY OF ARGUMENT

Rule 10(a)-(b) of the Supreme Court of the United States explicitly mentions intercircuit and state-federal conflict as reasons to grant certiorari ("a United States court of appeals has entered a decision

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[1] Pursuant to Supreme Court Rule 37.2(a), notice of FACDL's intent to file this *amicus curiae* brief was received by counsel of record for all parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this *amicus curiae* brief. The undersigneds further affirm that no counsel for a party authored this brief in whole or in part and no person or entity other than FACDL and its counsel made a monetary contribution specifically for the preparation or submission of this brief.

in conflict with the decision of another United States court of appeals on the same important matter" or "a state court of last resort has decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals"). Only the Supreme Court can resolve such a conflict and bring consistency to the law.

The Fourth Circuit's recent decision in *United States v. Graham*, No. 12-4825, 2015 U.S. App. LEXIS 13653 (4th Cir. Aug. 5, 2015) creates direct conflict with the Eleventh Circuit's decision in *United States v. Davis*, 785 F. 3d 498 (11th Cir. 2015), on two grounds: (1) whether law enforcement's acquisition of an individual's historical cell-site location data ("CSLI") from his cellular service provider constitutes a search under the Fourth Amendment; and (2) assuming it is a search, whether that search requires a warrant.

Additionally, Article I, section 12 of the Florida Constitution contains a conformity clause requiring Florida state courts to follow United States Supreme Court decisions interpreting the Fourth Amendment. Consequently, the *Davis* decision presents a conflict with the Florida Supreme Court's decision in *Tracey v. State*, 152 So. 3d 504 (Fla. 2014), leaving Florida judges, law enforcement officers, and attorneys with a legal conundrum that can be resolved only by this Court.

ARGUMENT

I. THERE IS NO SIGNIFICANT FUNCTIONAL, TECHNOLOGICAL, OR LEGAL DIFFERENCE BETWEEN REAL-TIME AND HISTORICAL CSLI.

A. There is No Significant Functional or Technological Difference between Real-Time and Historical CSLI.

In order to understand how the conflict arises, it is important to have a basic understanding of the technology involved. Real-time tracking and historical tracking utilize significantly similar tracking technology. Cell phones operate through the use of radio waves. To facilitate cell-phone use, cellular service providers maintain a network of cell towers throughout their coverage areas. *See Electronic Communications Privacy Act (ECPA) (Part II): Geolocation Privacy and Surveillance: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations, of the H. Comm. on the Judiciary*, 113th Cong. 50 (2013) (written testimony of Matt Blaze) ("Blaze Testimony"). Coverage areas often overlap and coverage is handed off from tower to tower. Most towers have sectors, which are configured with three 120-degree sectors for the full 360 degrees. For instance, if a cell tower has three antennas, each corresponding cell site would service an area within a 120-degree arc. *See* Thomas A. O'Malley, *Using Historical Cell Site*

Analysis Evidence in Criminal Trials, U.S. Att'y Bull., Nov. 2011, at 19.[2]

Whenever a cell phone makes or receives a call, sends or receives a text message, or otherwise sends or receives data, the phone generally connects via radio waves to an antenna on the closest cell tower, generating cell-site location information, (CSLI), including the geographic location of the cell tower and cell site serving the subject cell phone. When this data is collected at the time of the tracking, it is considered real-time. When the same data is gathered after the fact, the transaction is known as historical tracking.

In some cases, real-time tracking uses forced pings or application data to triangulate the phone's location. However, most rely on the connection that the phone makes to the tower for current location information. Cell phones periodically identify themselves to the closest cell tower — i.e., the one with the strongest radio signal — as they move throughout their network's coverage area. Blaze Testimony at 50. This process, known as "registration" or "pinging," facilitates the making and receiving of calls, the sending and receiving of text messages, and the sending and receiving of cell phone data. *See id.*

Pinging is automatic and occurs whenever the phone is on, without the user's input or control. U.S. Dep't of Homeland Sec., Lesson Plan: How Cell Phones Work 9 (2010) ("DHS Lesson Plan").[3] A cell

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[2] *Available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5906.pdf.

[3] *Available at* http://www.eff.org/files/filenode/3259_how_cell_phones_work_lp.pdf.

phone that is switched on will ping the nearest tower every seven to nine minutes. *Id.* Therefore, significant location data is often generated through both real-time and historical tracking despite a lack of user interaction with the phone. The data is readily available simply because the phone is on and not in "airplane mode.

Although it is possible that the methods of collection may vary, the technology behind tracking a phone remains consistent whether the tracking is done in real time or through historical records.

Additionally, because the number of cell phones has increased, the number of cell towers — and thus cell sites — has increased accordingly. Professor Matt Blaze of the University of Pennsylvania writes:

> A sector can handle only a limited number of simultaneous call connections given the amount of radio spectrum "bandwidth" allocated to the wireless carrier. As the density of cellular users grows in a given area, the only way for a carrier to accommodate more customers is to divide the coverage area into smaller and smaller sectors, each served by its own base station and antenna. New services, such as 3G and LTE/4G Internet, create more pressure on the available spectrum bandwidth, usually requiring, again, that the area covered by each sector be made smaller and smaller.

Blaze Testimony at 54. Densely populated areas have more cell towers covering smaller geographic locations. For example, within just one mile of the federal courthouse in New York City, there are 118 towers and 1,086 antennas. *Id.* The tracking in the instant case occurred in Miami, a densely populated area. *See* FLA. OFFICE ECONOMIC & DEMOGRAPHIC RESEARCH, POPULATION AND POPULATION CHANGE FOR METROPOLITAN STATISTICAL AREAS IN FLORIDA (2014) (showing an estimated population of 2.6 million people in Miami-Dade County).[4]

Commonly, cell towers are large, three-sided towers. However, smaller and smaller base stations are becoming increasingly common. These base stations include microcells, picocells, and femtocells, all of which cover a very specific area, such as one floor of a building, the waiting room of an office, or a single home. *In re Application for Telephone Information Needed for a Criminal Investigation*, No. 15-XR-90304, 2015 WL 4594558 (N.D. Cal. July 29, 2015) (public redacted version). These smaller base stations can increase tracking precision by "effectively identifying individual floors and rooms within buildings." Blaze Testimony at 55-56. "Although the ability of cellular service providers to track a cell phone's location within an area covered by a particular cell site might vary, it has become ever more possible for the govern-

[4] *Available at* http://edr.state.fl.us/Content/populationdemographics/data/MSA-2014.pdf.

ment to use CSLI to calculate a cell phone user's 'locations with a precision that approaches that of GPS.'" *Id.* at 53. The Northern District of California writes:

> The government acknowledged as much at oral argument, conceding that CSLI has gotten more precise over the years. Hr'g Tr. at 32:5-9. The fact is new tools and techniques are continually being developed to track CSLI with greater precision. Cellular service providers, for instance, can triangulate the location of a cell phone within an area served by a particular cell site based on the strength, angle, and timing of that cell phone's signal measured across multiple cell site locations.

In re Application for Telephone Information Needed for a Criminal Investigation, No. 15-XR-90304, 2015 WL 4594558 (N.D. Cal. July 29, 2015) (public redacted version).

Because the Government can now track a phone's historical data with the accuracy formerly available only in live tracking, the technological and functional distinction is now a legal fiction.

B. There is No Constitutionally-Significant Difference between Real-Time and Historical CSLI.

Just as there is no technological or functional difference between historical and real-time data, there is also no significant constitutional difference. Americans have an objective and subjective expectation of privacy in their locations, and tracking a citizen's location through his cell phone is a search under the Fourth Amendment. The expectation of privacy in one's location should remain the same regardless of the timing of the tracking.

The high courts of Florida, Massachusetts and New Jersey have all recognized a reasonable expectation of privacy in CSLI. *See Tracey*, 152 So. 3d at 525-26 (real-time CSLI); *Commonwealth v. Augustine*, 4 N.E.3d 846, 850 (Mass. 2014) (historical CSLI); *State v. Earls*, 70 A.3d 630, 644 (N.J. 2013) (real-time CSLI). In fact, six states (Colorado, Maine, Minnesota, Montana, Tennessee, and Utah) have passed statutes "expressly requiring law enforcement to apply for a search warrant to obtain this data."[5] *In re Application for Telephone Information Needed for a Criminal Investigation*, No. 15-XR-90304, 2015 WL 4594558 (N.D. Cal. July 29, 2015) (public redacted version). The public clearly has a strong *objective* expectation of privacy.

There is also a strong *subjective* expectation of privacy in both real-time and historical data. Americans certainly expect privacy in their cell-phone loca-

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[5] *See* Colo. Rev. Stat. § 16-3-303.5(2) (2015); Me. Rev. Stat. tit. 16, § 648 (2015); Minn. Stat. §§ 626A.28(3)(d) (2015), 626A.42(2) (2015); Mont. Code Ann. § 46-5-110(1)(a) (2015); Tenn. Code Ann. § 39-13-610(b) (2015); Utah Code Ann. § 77-23c-102(1)(a) (2015).

tion data. Just last year, the Pew Research Center reported that 82% of Americans classify the details of their physical location over time as sensitive information—more sensitive than their relationship history, religious or political views, or even the content of their text messages. Pew Research Center, Public Perceptions of Privacy and Security in the Post-Snowden Era, 34, 36-37 (Nov. 12, 2014)[6] (50% of respondents believed location information was "very sensitive"). In 2012, the Pew Center found that cell phone owners take a number of steps to protect access to their personal information and mobile data, and more than half of phone owners with mobile applications have uninstalled or decided to not install one or more applications due to concerns about the privacy of their personal information. Jan Lauren Boyles *et al.*, Privacy and Data Management on Mobile Devices, Pew Research Internet & American Life Project (Sept. 5, 2012).[7]

Americans do not differentiate between real-time and historical data in their privacy expectations, and the law should reflect that. Because the distinction, both technologically and legally, between historical data and real-time data is an artificial one, there is true conflict between the Eleventh Circuit and Fourth Circuit, as well as between the Eleventh Circuit and Florida.

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[6] *Available at* http://www.pewinternet.org/files/2014/11/PI_PublicPerceptionsofPrivacy_111214.pdf.

[7] *Available at* http://www.pewinternet.org/2012/09/05/privcy-and-data-management-on-mobile-devices/.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE NOT ONLY A CIRCUIT SPLIT, BUT ALSO A STATE-FEDERAL SPLIT THAT LEAVES FLORIDA CITIZENS AND THE LEGAL COMMUNITY WITHOUT CLEAR GUIDANCE.

In the instant case, the conflict is twofold: First, there is a split between the Eleventh Circuit (*Davis*) and the Fourth Circuit (*Graham*); and second, there is a split between the Eleventh Circuit (*Davis*) and the Florida Supreme Court (*Tracey*). After a review of *Davis* in section IIA. *infra*, the conflicts in *Graham* and *Tracey* are pointed out in turn.

A. The Eleventh Circuit's Decision in *Davis* Lays the Groundwork for the Conflict.

In *United States v. Davis*, the government obtained Davis's CSLI from his cell provider spanning a two-month time period. *Davis*, 785 F.3d at 501. On appeal, the Eleventh Circuit held that such governmental activity did not constitute a search within the meaning of the Fourth Amendment.

First, the court examined whether Davis had a subjective expectation of privacy in his location data. The court answered in the negative, finding that cell users

> know that they must transmit signals to cell towers within range, that the cell

> tower functions as the equipment connects the calls, that users when making or receiving calls are necessarily conveying or exposing to their service provider their general location within that cell tower's range, and that cell phone companies make records of cell-tower usage.

Id. at 511. The court stated that even assuming a subjective expectation of privacy, that expectation is not "justifiable or reasonable" under the facts of the case. *Id.*

In reaching this conclusion, the court compared the instant facts to *Smith v. Md.*, 442 U.S. 735 (1979), observing that the records for the stationary landlines contained location data "far more precise" than the cell records at issue because the phone lines in *Smith* "corresponded to stationary landlines at known physical addresses." *Id.* at 511-12.

Further, the court declared that the "longstanding third-party doctrine plainly controls the disposition of this case," *id.* at 512, as "[c]ell-phone users voluntarily convey cell tower location information to telephone companies in the course of making and receiving calls on their cell phones." *Id.* at 512 n.12.

Finally, the court noted that even if the cell records in the case were considered a search, it would be considered a reasonable one, as there was not only a minimal intrusion into any expectation of privacy Davis may have had in his location data, but a compelling governmental interest in promptly investigating crimes and apprehending offenders. *Id.* at 517, 518.

B. The Eleventh Circuit's Decision in *Davis* Conflicts with the Fourth Circuit's Decision in *Graham.*

In contrast to *Davis*, the Fourth Circuit found that the Government's procuring of CSLI did constitute a search, reasoning that a cell phone user has a recognized expectation of privacy in "comprehensive accounts of her movements, in her location, and in the location of her personal property in private spaces, particularly when such information is available only through technological means not in use by the general public." *Graham*, 2015 U.S. App. LEXIS 13653 at *22-23. The court categorized this expectation of privacy as reasonable and concluded that the government does indeed engage in a search under the Fourth Amendment when it seeks and uses such data, even when that search is of an inspection of third-party records. *Id.* at *31, *39.

The court analyzed the third-party doctrine and found it inapplicable, reasoning that cell users do not convey information to the cell service provider, "voluntarily or otherwise," and therefore "do not assume any risk of disclosure to law enforcement." *Id.* at *47. The court stated, "A cell phone user cannot be said to 'voluntarily convey' to her service provider information that she never held but was instead generated by the service provider itself without the user's involvement." *Id.* at *52. Important to the court's decision was the fact that location data is transmitted each time a call is *received*, not just placed—an action over which the cell user has no control.

More detail is provided in Petitioner's Supplemental Brief about the conflict between *Davis* and *Graham*. This Court should grant certiorari to resolve the split between the Eleventh Circuit's *Davis* decision and the Fourth Circuit's *Graham* decision.

C. The Eleventh Circuit's Decision in *Davis* Conflicts with the Florida Supreme Court's Decision in *Tracey.*

Article I, section 12 of the Florida Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. *This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if*

> *such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.*

Fla. Const. Art. I, § 12 (emphasis added). This "conformity clause" requires Florida to follow Supreme Court jurisprudence on Fourth Amendment questions. In doing so, the Florida Supreme Court, in *Tracey*, 152 So. 3d at 504, reached a decision that is in direct conflict with the instant case.

In *Tracey*, the Florida Supreme Court examined "whether accessing real-time cell site location information by the government in order to track a person using his cell phone is a Fourth Amendment search for which a warrant based on probable cause is required." *Id.* at 517. Based on allegations from a confidential informant, law enforcement officers applied for and received an order authorizing a pen register and trap-and-trace device on Tracey's cell phone. *Id.* at 506. The information provided by the cellular carrier also included real-time location data. Without obtaining an additional order or providing any further factual information, officers used this real-time data to track Tracey's movements, resulting in a traffic stop and subsequent arrest.

On appeal, the Fourth District noted that "there is some basis in federal law to support Tracey's contention that . . . an order authorizing real-time CSLI requires, as a precondition, the elevated showing of probable cause, and not the lower standard of

'specific and articulable facts.'" *Id.* at 509 (quoting *Tracey v. Florida*, 69 So. 3d 992, 999 (Fla. Dist. Ct. App. 2011)). At the same time, the court recognized the existing disagreement among courts across the country, observing that some courts have authorized disclosure upon the showing of "specific and articulable facts," while others have required a showing of probable cause. *Tracey*, 69 So. 3d at 999.

The Florida Supreme Court began its analysis by noting that the Fourth Amendment is "one of the bedrock principles of our federal constitution," *id.* at 511, and affirmed the need to hold that principle dear in this age of quickly-metamorphosing technology:

> If times have changed, such as they have now that technology has provided the government with technological capabilities scarcely imagined four decades ago, the protections of the Fourth Amendment are more, not less, important.

Id. at 512 (internal citations omitted). The court then examined United States Supreme Court precedent and moved into a thorough discussion of the holdings of various other federal courts. Notably, the court concluded that there is no difference in principle between real-time and historical data. *Id.* at 523.

The court ultimately held that law enforcement's use of Tracey's cell-site CSLI to track his position was a search under the Fourth Amendment for which probable cause was required. *Id.* at 526. In

reaching this conclusion, the court first found that Tracey had a

> subjective expectation of privacy in the location signals transmitted solely to enable the private and personal use of his cell phone . . . and that he did not voluntarily convey that information to the service provider for any purpose other than to enable use of his cell phone for its intended purpose.

Id. at 525. The court went on to find that this subjective expectation of privacy is one that society now recognizes as reasonable. *Id.* at 526. Because there was no probable cause to support the search, and no warrant was issued, the evidence was subject to suppression. *Id.*

Because the holding in *Tracey* directly conflicts with the holding in *Davis*, this Court should grant certiorari. Following is a discussion of the importance to Floridians of resolving the conflict.

III. THIS COURT SHOULD RESOLVE THE CONFLICTS IN ORDER TO PROVIDE CLEAR, UNAMBIGUOUS GUIDANCE TO FLORIDIANS.

By granting certiorari and resolving the current conflicts, this Court will provide much-needed guidance to Florida judges, law enforcement agencies,

prosecutors, defense attorneys, and citizens. It will enable Florida courts to apply the proper constitutional standards when making rulings. It will also educate law enforcement and prosecutors about the prerequisites necessary for obtaining CSLI and admitting it into evidence. Citizens will have a clear understanding of their rights and will be able to confidently exercise them when faced with government action. Finally, criminal defense attorneys will have clear guidelines to follow in providing effective counsel to their clients.

A. For the Benefit of Judicial Economy, the State Courts in Florida Need Guidance as to the Proper Constitutional Analysis in Cell Phone Tracking Cases.

State judges in Florida require a clear answer on whether historical CSLI is protected under the Fourth Amendment's warrant requirement. Under the current law in Florida state courts, there is not a distinction between real-time and historical data, and a warrant is required to obtain either type. *See Tracey*, 152 So. 3d at 523-26. As articulated *supra*, however, Florida's Conformity Clause requires its courts to follow this Court's jurisprudence on Fourth Amendment issues. Thus, Florida judges currently find themselves unsure of what standard to require of law enforcement when officers seek to obtain CSLI from a citizen. As courts across the state apply inconsistent standards, the number of appeals will increase, backlogging an already-overloaded judicial

system. Granting certiorari and providing a uniform standard will bring needed clarity to Florida's jurists.

B. Law Enforcement Personnel and Prosecutors in Florida Need Guidance as to Proper Procedure.

Florida's prosecutorial and investigative authorities would also benefit from this Court granting the Petition. Just as with the judicial branch, clarity on these issues is crucial to the proper administration of justice. Given the great burdens placed on individual law enforcement officers today, law enforcement agencies need to implement simple procedures for acquiring CSLI evidence. Similarly, given the high caseloads of assistant state attorneys, prosecuting agencies need straightforward procedures as well. The current split of authority complicates the giving of clear directives to both law enforcement officers and prosecutors.

This problem for law enforcement is further complicated in situations where local or state agencies work in concert with federal officials. A classic example is the Drug Enforcement Agency's frequent assistance to county sheriffs' offices and municipal police departments in furthering the war on drugs. A complication that could arise from the split of authority is the DEA being able to easily obtain CSLI records through a federal judge without obtaining a warrant under the lower standard provided for in 18 U.S.C. § 2703(c)-(d) (2015), while Florida law enforcement personnel cannot acquire such information on their own

without applying for a warrant. This would result in Florida law enforcement personnel and prosecutors having access to and benefiting from evidence obtained illegally (without a warrant) under Florida law.

Forum shopping adds another problem to the mix. What if a Florida prosecutor has reason to believe that a suspect's CSLI would provide evidence of a crime but has only minimal probable cause to support that belief? The easy solution is to involve federal authorities, either through a joint task force or by passing the case to an assistant United States attorney for prosecution under an analogous federal statute. That attorney could then present an application to a federal magistrate under the Stored Communications Act, which contains a lower standard and is much easier to meet.

Prosecutors and law enforcement agencies in Florida must be held to a consistent standard, which is impossible with the current conflicts in both state and federal courts.

C. The Citizens of Florida Need to Know How Private Their Cell Phone Records Actually Are.

In a world increasingly dependent on electronic communications and in which possession of a cell phone has practically become a necessity, the citizens and residents of Florida deserve a clear understanding of what privacy rights they potentially surrender to the government by using a cell phone. At the moment, Florida residents have no comfort in knowing

that their cell phone privacy is protected by the warrant requirement against state and local law enforcement officers and prosecutors because they cannot expect the same level of cell phone privacy from the federal government's reach.

Florida's population and number of densely-populated areas increases the significance of this problem. Because CSLI's accuracy increases in more densely-populated areas due to more cell towers covering an area, the potential for privacy invasion increases as well. Florida has a population of more than nineteen million people. FLA. OFFICE ECONOMIC & DEMOGRAPHIC RESEARCH, POPULATION AND POPULATION CHANGE FOR METROPOLITAN STATISTICAL AREAS IN FLORIDA (2014).[8] Within the State, there are six major metropolitan areas with populations of more than one million people: Miami, Fort Lauderdale, Palm Beach, Orlando, Tampa, and Jacksonville. *Id.* The increased precision of tracking mechanisms coupled with Florida's dense population makes this issue one of vital importance to Floridians.

Granting certiorari to Petitioner and making a decision on the merits would help the citizens and residents of Florida understand whether the federal government affords them the same expectation of privacy in historical data as do the states of Massachusetts, Colorado, Maine, Minnesota, Montana, Utah, and New Hampshire. *See* Pet. Cert. 23-24. Floridians and

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[8] *Available at* http://edr.state.fl.us/Content/population-demographics/data/MSA-2014.pdf.

citizens of all states deserve to know what it means to be "secure in their persons, houses, papers and effects, against unreasonable searches and seizures" in today's technology-dependent world.

D. Defense Attorneys in Florida Must be Able to Effectively and Efficiently Represent and Counsel Clients on the Privacy of Cell Phone Location Data.

The right to effective assistance of counsel for the criminally accused is necessary to protect the fundamental right to a fair trial under the Sixth Amendment and the Due Process Clause. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). *Accord Gideon v. Wainwright*, 372 U.S. 335 (1963); *Public Defender, Eleventh Judicial Circuit of Florida v. Florida*, 115 So. 3d 261, 266-67 (Fla. 2013). The essential requirements for effective assistance of counsel in Florida are laid out in the Rules Regulating the Florida Bar. The Rules require an attorney to "provide competent representation to a client," which requires "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." R. Reg. Fla. Bar 4-1.1. This requirement is particularly important for criminal defense attorneys as ineffective assistance can potentially result in clients losing their rights, their liberties, or even their lives.

In order to fully and effectively represent their clients, criminal defense attorneys in Florida need a clear answer on the issue of CSLI. When evaluating cases involving the government's acquisition of such

data, a defense attorney must decide whether he or she can make a legitimate argument for suppressing the evidence. Given the current conflicts in authority, this is undoubtedly a risky endeavor. The confusion is compounded if a client is facing – or potentially facing – both state and federal charges. As CSLI becomes a more common piece of evidence in criminal prosecutions, the confusion in the law calls for motions that are much more comprehensive and research- and argument-intensive than if the law were clearer. Thus, the lack of clarity in the law could have grave consequences for the clients of criminal defense attorneys.

When unsettled law burdens a lawyer's time and/or a client's financial resources, the effectiveness of representation is at risk. This is especially true for those representing Florida's indigent persons – assistant public defenders and regional conflict counsel – who are already lacking in time and resources while balancing heavy caseloads. As the Florida Supreme Court noted:

> [W]e are struck by the breadth and depth of the evidence of how the excessive caseload has impacted the Public Defender's representation of indigent defendants. . . . The noncapital felony caseload has been in the range of 400 cases per attorney for a number of years. Yet, even the highest caseload standard recommended by professional legal organizations is 200 to 300 less. . . . Third-degree felony attorneys often have as many as fifty cases set

> for trial in one week because of the excessive caseload. . . . Attorneys are routinely unable to interview clients, conduct investigations, take depositions, prepare mitigation, or counsel clients about pleas offered at arraignment. Instead, the office *engages in 'triage'* with the clients who are in custody or who face the most serious charges getting priority to the detriment of the other clients.

Public Defender, Eleventh Judicial Circuit of Florida v. Florida, 115 So. 3d at 273-274 (emphasis added) (internal citations omitted). Having to conduct intensive research and file and argue complex motions in CSLI cases only exacerbates this systemic problem. For all defense attorneys, as CSLI has become more commonplace, this will increase time spent (or at least the time that *should be* spent) on cases in an effort to navigate the legal quagmire caused by these conflicts.

CONCLUSION

As technology has vastly improved the tracking precision of historical data, bringing it close to that of real-time data, there is no sound reason to treat them as separate concepts. They should both be considered "searches" under the Fourth Amendment, requiring a showing of probable cause before a warrant can be issued.

Consequently, there are now two conflicts that require resolution: one between the Eleventh Circuit's *Davis* decision and the Fourth Circuit's *Graham* decision; and the other between *Davis* and the Florida Supreme Court's decision in *Tracey*. As Florida is bound to follow this Court's precedent in Fourth Amendment jurisprudence, Florida judges, prosecutors, law enforcement, defense attorneys, and citizens now find themselves in a state of limbo, unsure of which path to follow. This continued confusion will result in more motions to suppress, more appeals, conflicting advice from counsel, and a no-win situation for judges.

Accordingly, the Florida Association of Criminal Defense Lawyers, as *amicus curiae*, respectfully requests that this Court grant certiorari in this case.

Respectfully submitted,

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